

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**ULLIMAN SCHUTTE
CONSTRUCTION, LLC,**

And

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 542,
AFL-CIO.**

Case No. 5-CA-188093

**MOTION FOR PARTIAL SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

Pursuant to NLRB Rules and Regs. § 102.24(a) and 102.50, Respondent Ulliman Schutte Construction, LLC ("Ulliman Schutte" or "Respondent") hereby moves for partial summary judgment. The reason for this motion is General Counsel seeks to expand the ability of a paid union organizer acting as a "salt" to receive back pay after receiving an offer of employment in contravention of existing Board law. The hearing in this case has been docketed for February 20, 2018, but Respondent has not yet received a Notice of Hearing. It is important to receive a ruling on this motion or for the Board to issue a Notice to Show Cause because the hearing will become unnecessary if the Board agrees that the alleged discriminatee's right to receive back pay was cut off when Respondent offered his alter ego (the same person using a different name) a job and he rejected it. In support of this motion, Respondent shows to the Board the following:

I. STATEMENT OF UNDISPUTED FACTS

1. This is a "salting" case in which it is alleged Respondent failed to hire union organizer Frank Bankard, who is a full time paid employee and official of Charging Party, because of his Union affiliation, concerted activities or to discourage other employees from engaging in

these activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. Complaint, ¶ 5 and 6, attached as Exhibit 1 and Charge, attached as Exhibit 2.

2. Mr. Bankard alleges he applied for employment with Respondent on or about May 31, 2016, via email for a Crane Operator position at the Respondent's jobsite located in Salisbury, Maryland. Complaint, ¶ 5 and Exhibit 2.

3. The Complaint alleges that Respondent refused to hire Bankard as a crane operator on June 21, 2016. Complaint ¶ 5. On June 13, 2016, Respondent interviewed and offered a job as a crane operator to applicant "Joe Hill", which paid the same wage rate and provided the same benefits as the crane operator position for which Bankard applied. Decl. of William Straub, ¶ 4 and 5, attached as Exhibit 3. Joe Hill and Bankard are the same individual and Bankard applied for employment with Respondent under the alias Joe Hill on or about May 31, 2016. Decl. of William Straub, ¶ 3 and 8.

4. No other job offers were made by Respondent to applicants for an operator position between and May 31, 2016 and June 13, 2016. Decl. of William Straub, ¶ 7.

5. "Joe Hill" refused the offer of employment on the same day it was made. Decl. of William Straub, ¶ 6.

6. Respondent requested the General Counsel reconsider its position to seek back pay beyond the period when "Joe Hill" was offered employment by letter dated November 27, 2017. Attached as Exhibit 4. In his response dated November 29, 2017, General Counsel Robb directed that the issue would be decided under existing Board law and no expansion or reversal of current Board law would be sought. Attached as Exhibit 5.

7. The Compliance Specification in the Complaint states that back pay is due from June 21, 2016 and "continues until a valid offer of employment is made." Complaint, ¶ 8.

The General Counsel has offered no explanation why the offer of employment made to Frank Bankard/Joe Hill on June 13, 2016, was not a valid offer of employment.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Offer of Employment by Respondent to “Joe Hill” Terminates Any Right to Receive Back Pay or Instatement by Frank Bankard.

The sole issue to be decided in this motion is whether the offer of employment to “Joe Hill” on June 13, 2017, satisfies any potential back pay liability and instatement obligation of Respondent to Frank Bankard.¹ As discussed below, because Frank Bankard is Joe Hill, the issue must be answered in the affirmative.

In Board proceedings, summary judgment is appropriate where there are no genuine issues of material fact warranting a hearing and the moving party is entitled to judgment as a matter of law. *Glass Fabricators, Inc.*, 365 NLRB No. 125, *1-2 (NLRB 2017); *Security Walls, LLC*, 361 NLRB No. 29, *3 (NLRB 2014).

It has long been recognized by the Board that “[a] back pay order is a reparation order designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice.” *Oil Capitol Sheet Metal Inc.*, 349 NLRB 1348, 1351 (2007), citing *Nathan v. NLRB*, 344 U.S. 25, 27 (1952). “The objective is to restore ‘the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.’” *Id.*, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Board’s remedial authority “does not encompass punitive measures.” *Id.*, citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) and *Aneco, Inc. v. NLRB*, 285 F.3d 326, 329 (4th Cir. 2002).

¹ Respondent denies that it did not offer Bankard employment because of his union affiliation, sympathies or activities, but has offered to enter into a non-admission settlement with a Notice Posting if the offer of employment to Hill terminated Bankard’s back pay.

It is also a basic principle of Board law that an offer of employment terminates the employer's back pay and instatement obligation. In this case, General Counsel seeks an exception to this rule which would treat "salts", who use a fraudulent identity to obtain an offer of employment, more favorably than other discriminatees. The Board, however, has done the opposite and applied different and more stringent remedial requirements for the General Counsel in salting cases. *Oil Capitol*, 349 NLRB at 1351-1355. The Board has recognized that salts, unlike other applicants for employment, seek employment for different reasons, to further the union's organizing objectives and not for an indefinite duration. *Id.* at 1351. Therefore, in *Oil Capitol*, the Board refused to apply to salts the ordinary presumption that the applicant, if hired, would have remain employed indefinitely and would have transferred to an employer's other jobsites upon completion of a project. *Id.*

Obviously, had Bankard accepted the offer of employment made to Hill, only Bankard could have reported to work because Hill is not a real person. If Bankard had chosen to do so instead of fleeing the scene, he would have earned the same wages and received the same benefits as if the offer had been made to Bankard in his name. Had this occurred, Bankard would have suffered no financial loss and been made completely whole. Therefore, any additional back pay amount is not compensatory, but blatantly punitive. By pursuing this unprecedented theory, the General Counsel is ignoring the Board's admonition and warning in *Oil Capitol* of a "greater risk of a punitive back pay award" in salting cases.² *Id.* at fn. 14.

In addition, in *Oil Capitol*, the Board further reasoned there is a "need for a more rational and balanced approach in fashioning remedies in cases involving union salts." *Id.* at 1351. In such

² This statement was made in the context of applying the presumption of indefinite employment, but has greater force in this case where the alleged discriminatee was given the opportunity to report to work and engage in organizing activity, which is his objective, but refused the offer of employment.

cases, the back pay amount should only compensate the alleged discriminatee for his actual losses and not constitute “a windfall award that bears no reasonable relation to the injury sustained.” *Id.* at 1353. It is hard to imagine a more unbalanced and irrational approach then providing back pay to an individual who had rejected an offer of employment because it was made to the same person acting under an alias and false identity. This is particularly disturbing here because concealing their true identity when applying for employment is a common tactic used by salts. *E.g.*, *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995).

To the extent General Counsel argues that the offer of employment to fictitious Joe Hill does not count as an offer to Frank Bankard because Respondent believed Hill was anti-union, which Respondent denies, such an argument is meritless. The Board has never considered an employer’s motive in determining whether an offer of employment is valid. Either an offer of employment is made or it is not. The employer’s reasons for doing so are irrelevant.³

No crane operators positions were available between the time of Bankard’s alleged application and the offer of employment made to Bankard/Hill. Therefore, as a matter of law, Bankard is not entitled to back pay or instatement.

III. CONCLUSION

For the reasons discussed, Respondent respectfully requests that the Board issue an Order that alleged discriminatee Frank Bankard is not entitled to recover back pay or instatement as remedies in this case.

³ The unreviewed decision of ALJ Amchan in a salting case also involving Frank Bankard does not address the remedial issue here. See, *Tube City IMS, LLC*, 2011 NLRB LEXIS 157(April 5, 2011). In that case, Bankard applied for employment under his true name and was not offered employment and also applied under the alias Joe Banco, who was offered employment. ALJ Amchan found that Bankard was not hired because he was a union organizer and ordered a make remedy consistent with *Oil Capitol*. ALJ Amchan did not address whether the offer to Bankard as Banco terminated his right to back pay or instatement at that point in time. His decision was limited to the narrow issue that applying for employment under an alias did not disqualify Bankard from protection under the Act.

Respectfully submitted this 23rd day of January, 2018.

By: /s/ Dion Y. Kohler
Dion Y. Kohler

**ATTORNEYS FOR
RESPONDENT ULLIMAN SCHUTTE
CONSTRUCTION, LLC.**

Jackson Lewis P.C.
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, GA 30309
(404) 525-8200 – Telephone
404) 525-1173 – Facsimile
kohlerd@jacksonlewis.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**ULLIMAN SCHUTTE
CONSTRUCTION, LLC,**

And

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 542,
AFL-CIO.**

Case No. 5-CA-188093

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2018, I filed a true copy of the **Motion for Partial Summary Judgment and Memorandum in Support** via the NLRB's electronic website and served upon the following via U. S mail, postage-paid, addressed to:

Mr. Frank Bankard
International Union of Operating Engineers,
Local 542, AFL-CIO
1375 Virginia Drive, Suite 100
Fort Washington, PA 19034

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles St., Suite 600
Baltimore, MD 21201

By: /s/ Dion Y. Kohler

Dion Y. Kohler

**ATTORNEYS FOR RESPONDENT
ULLIMAN SCHUTTE CONSTRUCTION,
LLC.**

EXHIBIT “1”

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

ULLIMAN SCHUTTE CONSTRUCTION, LLC

and

Case 5-CA-188093

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 542, AFL-CIO

**COMPLAINT, COMPLIANCE SPECIFICATION
AND NOTICE OF HEARING**

Pursuant to Section 102.54(c) of the Rules and Regulations of the National Labor Relations Board (the Board), and to avoid unnecessary costs or delay, IT IS ORDERED THAT the Complaint is consolidated with the Compliance Specification in this matter.

COMPLAINT

This Complaint and Notice of Hearing is based on a charge filed by International Union of Operating Engineers, Local 542, AFL-CIO (the Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Ulliman Schutte Construction, LLC (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by the Charging Party on November 11, 2016, and a copy was served on Respondent by U.S. mail on November 15, 2016.
2. (a) At all material times, Respondent has been a limited liability company with an office and place of business in Salisbury, Maryland (Respondent's facility), and has been engaged in water and wastewater treatment plant construction and renovation.

(b) In conducting its operations during the 12-month period ending July 31, 2017, Respondent performed services valued in excess of \$50,000 in states other than the State of Maryland.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, William Straub held the position of Respondent's project superintendent and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

5. (a) About May 31, 2016, Respondent was hiring, or had concrete plans to hire, a hydraulic crane operator.

(b) About June 21, 2016, Respondent refused to hire Frank Bankard.

(c) Respondent engaged in the conduct described above in paragraph 5(b) because the named employee joined and assisted the Charging Party, and engaged in concerted activities, and to discourage employees from engaging in these activities.

6. By the conduct described above in paragraph 5, Respondent has been discriminating in regard to hire or tenure, or terms and conditions of employment, of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

7. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

In order to fully remedy the unfair labor practices set forth above in paragraphs 5 and 6, the General Counsel seeks an Order requiring that Frank Bankard be made whole including, but not limited to, payment for consequential economic harm he incurred as a result of Respondent's unlawful conduct.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

COMPLIANCE SPECIFICATION

As a controversy presently exists over the amount of backpay due, the Regional Director of the National Labor Relations Board for Region 5, pursuant to the authority duly conferred upon him by the Board, hereby issues this Compliance Specification and alleges as follows:

BACKPAY PERIOD

8. The backpay period for Frank Bankard begins on June 21, 2016, and continues until a valid offer of employment is made.

COMPUTATIONS OF BACKPAY

9. An appropriate measure of the gross backpay due to discriminatee Frank Bankard is the amount he would have earned if hired for crane work during the backpay period described above in paragraph 8.

10. (a) The calendar quarter gross backpay discriminatee Frank Bankard would have earned is determined by multiplying the regular quarterly hours by the appropriate hourly wage rate, plus additional benefits as defined below.

(b) Discriminatee Frank Bankard would have worked 40 regular hours per week, which results in 520 regular hours per calendar quarter.

(c) The hourly wage rate offered by Respondent for the crane operator position was \$28.00 per hour.

(d) Respondent's employment offer also included hourly fringe benefit contributions in the amount of \$7.69 per hour.

(e) The calendar quarter gross backpay and benefits due to discriminatee Frank Bankard are set forth in Exhibit 1.

11. During the backpay period, discriminatee Frank Bankard had interim earnings as set forth in Exhibit 1.

12. The calendar quarter back pay due to discriminatee Frank Bankard is determined by subtracting his calendar quarter interim earnings from his calendar quarter gross backpay, and is \$81,698.98, as set forth in Exhibit 1.

COMPENSATION FOR ADVERSE TAX CONSEQUENCES

13. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 110 (2014), the discriminatee is entitled to compensation for the adverse income tax consequences of receiving make-whole relief in a lump-sum when the backpay owed is for a period over 1-year. The adverse tax consequences include excess taxes paid on the lump sum as well as incremental taxes due on the excess tax amount. If not for the unfair labor practice committed by Respondent, the backpay award for the discriminatee would have been paid in 2016 and 2017, rather than in 2017.¹

¹ Excess tax liability will need to be recalculated if the lump-sum payment is not made in 2017.

14. (a) In order to determine what the appropriate excess tax award should be, the amount of federal and state taxes needs to be calculated for the backpay as if the monies were paid when they were earned throughout the backpay period, as described below in paragraph 15.

(b) Additionally, the amount of federal and state taxes that will be paid on the lump sum payment needs to be calculated, if the payment is made in 2017, as described below in paragraph 16.

(c) The excess tax liability is the difference between the amounts described in paragraph 14(b) and paragraph 14(a).

(d) The amount of adverse tax consequence due to the discriminatee cannot be determined until the backpay amount is finalized and final payment is imminent. At the appropriate time the Region will determine the amount of adverse tax consequence due to the discriminatee by following the method described below in paragraphs 15 through 19.

ADVERSE TAX CONSEQUENCE CALCULATION METHOD

15. (a) The amount of taxable income due to the discriminatee for each year is based on the amount of backpay due to him as summarized above in this Compliance Specification and set forth in Exhibit 1.

(b) Using the taxable income for the appropriate years, federal and state taxes will be calculated using the federal and state tax rates for the appropriate years and the discriminatee's filing status and filing State.

16. (a) The lump sum amount due to the discriminatee is the total amount of backpay and other benefits due to him as described in this specification and set forth in Exhibit 1.

(b) The amount of taxes owed in the year the backpay award will be paid will be based on the current federal and state tax rates and on the discriminatee's filing status and filing State.

(c) The adverse tax consequence is the difference between the amount of taxes on the lump sum amount being paid, and the amount of taxes the discriminatee would have paid in 2016 and 2017.

17. (a) The excess tax liability payment that is to be made to the discriminatee is taxable income which will result in additional tax liabilities. This amount is called the incremental tax liability.

(b) The incremental tax includes all of the taxes the discriminatee will owe on the excess tax liability payment.

(c) The incremental tax is determined based on the federal tax rate used for calculating taxes on the backpay award and the average state tax rate for 2017.

18. The total adverse tax consequence due to the discriminatee is determined by adding the excess tax liability and the incremental tax liability.

19. The discriminatee is also entitled to payment for the increased tax he will pay on the interest received. The amount of interest is unknown as it continues to accrue until date of payment. The amount of excess tax liability and incremental tax liability on the interest payment will be calculated according to the formulas set forth above in paragraphs 15 through 18.

SUMMARY

Summarizing the facts and calculations specified above and in Exhibit 1, Respondent's obligation is to make the discriminatee whole for monetary losses by payment in

the amount of \$81,698.98, plus interest as computed daily, to the date of payment, and Respondent's share of FICA contributions, and additional sums accruing until a valid offer of employment is made, as described in paragraph 8. Respondent is also obligated to pay a currently undetermined amount for the excess tax liability of discriminatee Frank Bankard, plus additional sums due as described in paragraph 19 and footnote 1. The amount of backpay and benefits owed is calculated through August 26, 2017, and is \$81,698.98.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20, 102.21, and 102.56 of the Board's Rules and Regulations, it must file an answer to the Complaint and Compliance Specification. The answer must be received by this office on or before September 14, 2017, or postmarked on or before September 13, 2017. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties

or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the Compliance Specification paragraphs 8 through 11 that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge, and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint and Compliance Specification are true. If the answer fails to deny allegations of the Compliance Specification paragraphs 8 through 11 in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on December 7, 2017, at 10:00 a.m., at Hearing Room A, Bank of America Center – Tower II, 6th Floor, 100 South Charles Street, Baltimore, Maryland, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Baltimore, Maryland this 24th day of August 2017.

(SEAL)

/s/ CHARLES L. POSNER

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center - Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201

Attachments

EXHIBIT 1

Backpay Due to Frank Bankard

Quarter	Calendar Quarter Regular Hours	Hourly Wage Rate	Hourly Fringe Rate	Calendar Quarter Gross Backpay	Calendar Quarter Interim Earnings	Calendar Quarter Net Backpay
2Q 2016	64	\$28.00	\$7.69	\$2,284.16	\$9,948.71	\$0.00
3Q 2016	520	\$28.00	\$7.69	\$18,558.80	\$5,384.62	\$13,174.18
4Q 2016	520	\$28.00	\$7.69	\$18,558.80		\$18,558.80
1Q 2017	520	\$28.00	\$7.69	\$18,558.80		\$18,558.80
2Q 2017	520	\$28.00	\$7.69	\$18,558.80		\$18,558.80
3Q 2017	360	\$28.00	\$7.69	\$12,848.40		\$12,848.40
						\$81,698.98

**Backpay calculated through August 26, 2017, additional backpay may accrue until a valid offer of reinstatement is made

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. You may be represented at this hearing by an attorney or other representative. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 5-CA-188093

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

COUNSEL FOR RESPONDENT:

LAURA A. PIERSON-SCHEINBERG, ESQ.
JACKSON, LEWIS, P.C.
SUITE 200
2800 QUARRY LAKE DRIVE
BALTIMORE, MD 21209

RESPONDENT:

MR. WILLIAM STRAUB
ULLMAN, SCHUTTE
7615 STANDING PLACE
ROCKEVILLE, MD 20855

COUNSEL FOR CHARGING PARTY:

CHARGING PARTY:

MR. FRANK BANKARD
INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 542, AFL-CIO
1375 VIRGINIA DRIVE, SUITE 100
FORT WASHINGTON, PA 19034

EXHIBIT "2"

Amby Bowman

From: Al McCullough
Sent: Friday, January 06, 2017 4:19 PM
To: Amby Bowman
Subject: FW: Employment Inquiry about Skilled Craftspeople
Attachments: crane_m_d_2016.pdf

From: John Coffin
Sent: Tuesday, May 31, 2016 7:25 PM
To: Al McCullough <amccullough@ullimanschutte.com>
Subject: Fwd: Employment Inquiry about Skilled Craftspeople

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: Fank Bankard via Ulliman Schutte Website <website@ullimanschutte.com>
Date: 5/31/2016 1:45 PM (GMT-05:00)
To: John Coffin <jcoffin@ullimanschutte.com>
Subject: Employment Inquiry about Skilled Craftspeople

Hello, I noticed on Craigslist you are currently advertising for a Crane Operator and just wanted to attach my resume here as well.

Thanks,
Frank Bankard
267-784-7744

-- Fank Bankard
oe542@yahoo.com
267-784-7744

[Download Resume \(crane_m_d_2016.pdf\)](#)

Frank Bankard
30850 Short Cove Ct.
Millsboro DE 19966
Cell > 267-784-7744
oe542@yahoo.com

Qualifications:

25 plus years as an Equipment Operator on all types of Heavy Equipment as in Cranes from 6 tons to 500 tons, in Hydraulics, Conventional, Crawlers, Rough-terrain, Tower, & Barges. I have NCCCO (Commission Certified Crane Operator) along with Pennsylvania, New Jersey Crane Licenses. I further am proficient in operating Excavators, Loaders, Pippins, Side-booms, Graduals. I also have a CDL Class 'A' Driver's License and have performed Tractor Trailer work as in hauling equipment and all types of building and construction materials. I also have performed dump truck hauling work. Some equipment manufactures I have tested out and performed extensive duties but not exclusive; Caterpillar, JCB, John Deer, American, Grove, Krupp, Liebherr, Manitowoc, National, P&H, Potain, Tadano, etc.. I further have performed extensive shop work from equipment repairs to welding and fabrication.

Work Field Experience in: Heavy Highway, Bridge, Commercial, Steel Erection, Pile Driving, Concrete Pouring, Clamming, Rigging, Hook Work, Window and Cage Work, Refinery, Compressor Station.

Various work duties are in the following fields Commercial, Residential, Highway, Steel-Mills, Refinery, Quarries, Electrical Plants, Natural Gas Compressor Stations, Foundries, Pipeline, Heavy Highway, Bridge Demolition, Repair and Replacement, Barges, Windmills, Military Bases and Highway etc.

I have additionally maintained and repaired most equipment mention above along with obtaining certification in welding and pipe welding (5g-6g).

Other noteworthy qualifications: Mechanic/Welder. I have performed steel connection along with welding and burning in building erection to dismantlement. I have also performed pipeline welding on 6" to 24" pipe, certified in 5g and 6g. I have worked as road and shop mechanic on heavy equipment and trucks.

Work History

- *1999 to Present* > **International Union of Operating Engineers Local 542** Fort Washington PA. 215-542-7500 Hired as an Organizer. Duties, to perform the task of organizing companies that are not currently organized. Primarily, work for various non-signatory companies as a full time employee throughout the United States and Canada to establish a genuine working relationship with my employer with hopes to organize my employer on my own time as per lunch, breaks, and before and after work. Contact Robert Heenan.
- *2001 to Present* > **IUOE Local 542 Joint Apprentice Training Committee** 1375 Virginia Drive. Suite 101 Fort Washington PA. 19034. 215-591-5282, Temporary assignments involving weekend work on community projects of various construction projects. Provide updated training to members in all aspects, to Heavy Equipment Operation, Utility work and Crane Certifications. Contact Dan Sullivan.

- 2016 > (April-May) **ABC York** 176 Bowman Rd York PA. 17408 Ph. 888-236-6795 Crane Operator on Mill Projects. Was terminated because I would not violate OSHA or ASME 30 Laws. Contact Ed Miller.
- 2016 > **G.M.H. Associates of America, Inc.** 5 Chelton Way Building 15 Trenton, NJ 08638 Crane Operator on various work projects mostly in Highway, Utility, Sewer and Municipality work. Finished project in March 2016.
- 2015 > **Strom Engineering** 10505 Wayzata Blvd. Minnetonka MN 55305 952-544-8644. Temporary Assignment of a Crane Operator. Job ended in December. Contact Angela Schwab.
- 2015 > **LPR Construction** 1171 Des Moines Avenue, Loveland, Colorado 80537 , 800.577.1844 worked on Moxie Energy project in Wysox Pa as a Crane Operator. Was able to get all Crane Operators onsite under Local 542 Agreement. Job recently finished.
- 2014 > **REF-CHEM** Odessa, TX 79761 P.O. Box 2588 Odessa, TX 79760 432-332-8531 working in the Marcellus Shale region operating all types of Heavy Equipment and all types of Cranes as noted above involving utility work. Mostly Rough Terrain Cranes from 90 ton down. Project finished.
- 2013 > **Best Line Equipment** > 210 Jacksonville Road Hatboro PA 19040 215-675-3009. Equipment Mechanic on various types of Rental Equipment Company supplies for rentals and sales. Reason for leaving, terminated for organizing.
- 2010-2012 > **International Mill Services** > 4001 Claymont Delaware 19703 302-798-0364. Duties include Operation of all types of Cranes from 30 ton – 175 ton Conventional, Overhead and Hydraulic and heavy equipment for demolition. I further performed mechanical duties as per equipment owned or leased by IMS. Equipment, operated and repaired P&H, American, National, Tadano and Link-Belt. Also perform welding as noted in the above qualifications.
- 2010-2010 > **J.F. Shay Construction** > P.O. Box 57 Marlton NJ 08053 609-383-8721. Duties include Highway Crane and Heavy Equipment operation of Bridge Demo, Restoration and rebuild. Asked to leave after signing company to a full Collective Bargaining Agreement.
- 2008 – 2010 > **Harrah's Casino Racetrack** > 2 Morton Ave. Chester Pa 19013 phone 484-490-1800 Duties as Heavy Equipment Operator on building erection. When site was completed was put on as site mechanic for all Track equipment repairs and welding. Organizing Unit completed and was asked to leave by management. Contact Mike Torcello.
- 2004 to 2006 > **Carvel & Rick** 1780 Newport Rd. Ephrata PA 17522 1-717-859-5633. Duties include daily crane rentals on various types of cranes as in rough terrain, boom truck, truck cranes as in conventional and hydraulic. Work projects as in; highway work, building work, tank farms, etc. Operate all Hydraulic and Conventional Cranes owned by the company from 30ton to 175ton. Laid off lack of work. Contact Kevin Sollenberger

Education

1975-1978 > **Pennridge High School** 5th Street Perkasie PA Graduate in 1978 .

1975-1978 > **Upper Bucks Technical School** Ridge Rd. Elephant PA Graduated in course for Diesel Mechanics.

1979 > **Upper Bucks Technical School** Ridge Rd. Elephant PA. Course in Welding , certified in Stick , Mig , Dual Shield .

1983-1984 > **Allentown College of St. Francis de-Sales** Center Valley PA General courses selection one and half years completed .

1998- 2000 > **Penn State Ogontz Campus** for computer studies. (Certificate in Windows)

1984 > **Welder Training and Testing Institute** Allentown PA Additional training and certification in pipe welding

EXHIBIT “3”

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

ULLIMAN SCHUTTE CONSTRUCTION,)	
LLC,)	
)	
And)	Case No. 5-CA-188903
)	
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS, LOCAL 542,)	
AFL-CIO.)	

DECLARATION OF WILLIAM STRAUB

I, William Straub, certify under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am employed by Ulliman Schutte Construction, LLC as a Superintendent and have worked for Ulliman Schutte for more than 15 years.
2. During 2016, I was the Superintendent for a waste and water treatment plant project performed by Ulliman Schutte, which was located in Salisbury, Maryland.
3. In June 2016, a crane operator named Bob Aswell retired, and on June 13, 2016, I interviewed in person an applicant, who represented he was Joe Hill, to replace Mr. Aswell. A true and correct copy of Mr. Hill's resume, which he sent me by email on May 31, 2016 is attached as Attachment A.
4. The interview took place in our jobsite trailer. At the end of the interview, I offered Mr. Hill a crane operator position and gave him an application form to complete, which I am required to do by the Company when I hire someone and they have not yet completed an application form.

5. The crane operator position I offered to Mr. Hill paid the same wage rate and provided the same benefits as the crane operator position which Frank Bankard claims he applied for in May of 2016.
6. Mr. Hill said he was going to car to get his wallet (I thought to get information he needed for the application form), but he did not return. To my knowledge, this Mr. Hill made no further contact with the Company about his job offer.
7. No job offers were made by the Company to applicants for a crane operator position between May 31, 2016 and June 13, 2016.
8. I later learned that Frank Bankard is Joe Hill and there is no such person as Joe Hill.

According to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of January, 2018 in PALMYRA, VA.

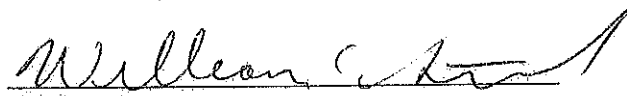

William Straub

EXHIBIT “4”



Attorneys at Law

Jackson Lewis P.C.
1155 Peachtree Street NE
Suite 1000
Atlanta, Georgia 30309-3600
Tel 404 525-8200
Fax 404 525-1173
www.jacksonlewis.com

MY DIRECT DIAL IS: 404-586-1843
MY EMAIL ADDRESS IS: KOHLERD@JACKSONLEWIS.COM

Representing Management Exclusively in Workplace Law and Related Litigation

ALBANY, NY	GREENVILLE, SC	MONMOUTH COUNTY, NJ	RALEIGH, NC
ALBUQUERQUE, NM	HARTFORD, CT	MORRISTOWN, NJ	RAPID CITY, SD
ATLANTA, GA	HONOLULU, HI*	NEW ORLEANS, LA	RICHMOND, VA
AUSTIN, TX	HOUSTON, TX	NEW YORK, NY	SACRAMENTO, CA
BALTIMORE, MD	INDIANAPOLIS, IN	NORFOLK, VA	SALT LAKE CITY, UT
BIRMINGHAM, AL	JACKSONVILLE, FL	OMAHA, NE	SAN DIEGO, CA
BOSTON, MA	KANSAS CITY REGION	ORANGE COUNTY, CA	SAN FRANCISCO, CA
CHICAGO, IL	LAS VEGAS, NV	ORLANDO, FL	SAN JUAN, PR
CINCINNATI, OH	LONG ISLAND, NY	PHILADELPHIA, PA	SEATTLE, WA
CLEVELAND, OH	LOS ANGELES, CA	PHOENIX, AZ	ST. LOUIS, MO
DALLAS, TX	MADISON, WI	PITTSBURGH, PA	TAMPA, FL
DAYTON, OH	MEMPHIS, TN	PORTLAND, OR	WASHINGTON, DC REGION
DENVER, CO	MIAMI, FL	PORTSMOUTH, NH	WHITE PLAINS, NY
DETROIT, MI	MILWAUKEE, WI	PROVIDENCE, RI	
GRAND RAPIDS, MI	MINNEAPOLIS, MN		

*through an affiliation with Jackson Lewis P.C., a Law Corporation

November 17, 2017

VIA E-MAIL & U.S. MAIL

Peter Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Case 05-CA-188093 Ulliman Schutte Construction, LLC

Dear Mr. Robb:

We are writing on behalf of Respondent Ulliman Schutte Construction, LLC to request reconsideration of the former General Counsel Richard Griffin's decision to challenge the current state of Board law in calculating damages in paid union organizer "salt" cases under *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), and for reconsideration of Region 5's issuance of a complaint in Case 05-CA-188093, which we believe is the Region's vehicle for initiating the aforementioned change. Time is of the essence as the trial date has been set for December 7, 2017. A copy of the complaint is enclosed as Exhibit A.

This is a "salting" case in which it is alleged Respondent failed to hire union organizer Frank Bankard, who is a full time employee and official of Charging Party. Bankard alleges he applied for employment with Respondent on or about May 31, 2016 via email. The Complaint alleges that Respondent refused to hire Bankard on June 21, 2017. On June 13, 2016, Respondent offered a job to "Joe Hill," another applicant. Joe Hill and Bankard are the same individual and Bankard applied for employment with Respondent under the alias Joe Hill on or about May 31, 2016. Thus, the offer of employment to Hill was made to Bankard. Bankard/Hill refused the offer of employment on the same day it was made.

In *Oil Capitol*, the Board determined that when a union salt is the discriminatee, the burden should be on the General Counsel to prove that the salt would have remained in the service of the employer for the duration of the claimed backpay period. 349 NLRB 1348 (2007). Former General Counsel Griffin wanted to overturn *Oil Capitol* in an attempt to expand the backpay period to \$80,000 for the alleged discriminate in this case, even though he was offered and rejected the first offer of employment after his alleged application.

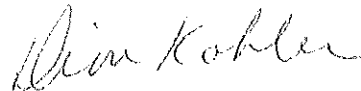
If the General Counsel stops seeking to overturn *Oil Capitol*, this case will be about 5 days of backpay damages because Respondent offered the salt's alias the position five days after he allegedly applied and the alias did not accept the employment offer. It is our understanding that Region 5 agrees that 5 days of backpay is appropriate in this case.

Under the current leadership and administration, we hope that you will take a second look at former General Counsel Griffin's decision to upend the current state of Board law under *Oil Capitol* that has been working for parties for over 7 years and that the Board has affirmed in at least 24 Board decisions.

We are happy to meet to discuss the facts and merits of this case further.

Sincerely,

JACKSON LEWIS P.C.



Dion Y. Kohler

Enclosure

cc: Andrew Andela, NLRB, Region 5 (via email – w/enclosure)

EXHIBIT “5”



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570
www.nlr.gov

November 29, 2017

Dion Y. Kohler, Esq.
Jackson Lewis, P.C.
1155 Peachtree Street NE Suite 1000
Atlanta, GA 30309-3600

BY E-MAIL and U.S. MAIL

Re: Ulliman Schutte Construction, LLC
Case 05-CA-188093

Dear Mr. Kohler,

This letter is being sent in response to your November 27, 2017 correspondence to me regarding the above-referenced matter.

Specifically, the letter seeks reconsideration of former General Counsel Griffin's decision to challenge the current state of Board law in calculating damages in "salting" case under Oil Capitol Sheet Metal, 349 NLRB 1348 (2007), as well as the decision to issue a complaint. The letter also argues that, absent reversal of Oil Capitol Sheet Metal, the alleged discriminatee would be entitled to five days of backpay because his failure to accept an offer of employment made to his alias tolled his backpay.

I have determined that the allegations and calculations included in the Complaint, Compliance Specification and Notice of Hearing will be based on application of extant Board law, and not on reversal of Oil Capitol Sheet Metal. I note that Region 5 does not agree that five days of backpay is an appropriate remedy in this case and the Region is fully prepared to discuss the appropriate backpay under extant Board law. However, absent receipt of a reasonable settlement offer and ultimate approval, Region 5 will proceed with litigating the matter.

I encourage you to continue to engage in settlement discussions as a mutually-acceptable resolution is preferable to the expense and uncertainty of litigation.

Sincerely,

A handwritten signature in cursive script, reading "Peter B. Robb".

Peter B. Robb
General Counsel